

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2004-0165, Dennis Bostrom & a. v. Philip Bogdonov d/b/a Peer Group, the court on August 31, 2005, issued the following order:

The plaintiffs, Dennis Bostrom and Bostrom Enterprises, Inc. (BEI), appeal an order of the trial court awarding the defendant, Philip Bogdonov d/b/a Peer Group (Peer Group), \$243,024 in lost income and profits. They contend that the trial court erred in calculating the damage award and in failing to clarify whether damages were awarded against Dennis Bostrom personally. In its cross-appeal, Peer Group contends that the trial court erred by failing to award damages for its breach of fiduciary duty claim. We vacate the damage award and remand.

In 1993, Peer Group hired Bostrom as a consultant. In 1995, Peer Group and BEI entered into a contract containing a non-competition clause. In March 2002, Peer Group terminated both contracts. Bostrom and BEI filed suit to collect unpaid commissions. Peer Group filed a counter-claim alleging that Bostrom and BEI had violated the non-competition clause and seeking damages, restitution and injunctive relief. After a bench trial, the court awarded Peer Group \$243,024, offset by \$12,351 in commissions that it found Peer Group owed to Bostrom. On appeal, BEI concedes that the 1995 contract restrictions were in effect and that BEI breached them.

We will not disturb the trial court's decision unless it is erroneous as a matter of law or unsupported by the evidence. Riverwood Commercial Prop's v. Cole, 134 N.H. 487, 490 (1991). A party seeking lost profits must prove by a preponderance of the evidence that the claimed profits were reasonably certain in the absence of the breach. Fitz v. Coutinho, 136 N.H. 721, 725 (1993). In addition to establishing the existence of lost profits, the party must establish the amount with reasonable certainty. *Id.* at 726. In reviewing a damage award, we view the evidence in the light most favorable to the prevailing party. Whitehouse v. Rytman, 122 N.H. 777, 780 (1982).

In this case, the trial court awarded Peer Group \$101,260 in pre-injunction damages and \$141,764 in post-injunction damages. The court's order, however, does not include any calculation for Peer Group's overhead expenses. In addition, although evidence was presented that Johnson's of Stillwater cancelled its contract in January 2003 due to the sale of the dealership, the court included Johnson's monthly retainer after January 2003 in its calculation of lost profits. Moreover, after reviewing the findings and rulings addressed by the trial court, we are unsure whether damages were awarded against Dennis Bostrom personally. We therefore vacate and remand that portion of the trial court order that awarded damages to allow the court to reconsider and more fully explain any award of damages it may make, and to clarify whether any such award is against Bostrom personally. In making its award, the court should also consider whether Peer Group would, more probably than not, have received the income from the clients during the period in question.

We affirm the trial court's denial of Peer Group's breach of fiduciary duty claim. See Lash v. Cheshire County Savings Bank, 124 N.H. 435, 438 (1984) (whether fiduciary relationship exists is question of fact and factfinder's determination will not be set aside unless unsupported by the evidence). In awarding lost profits to the defendant, the trial court specifically found that it was more qualified than the plaintiff to perform the services contemplated under the contracts. See Brzica v. Trustees of Dartmouth College, 147 N.H. 443, 447-48 (2002) (fiduciary relationship exists between two persons when one has gained confidence of other and purports to act or advise in a selfless fashion with the other's interests in mind). Given the trial court's finding, it is difficult to conceive of any set of circumstances in which the plaintiff had a fiduciary relationship to the defendant. See id. at 448 (describing fiduciary relationship as one in which one party stands in submissive, inferior or dependent position with respect to other).

To the extent that the parties seek to present other arguments, they were not raised in their notices of appeal and are therefore not properly before us. State v. Blackmer, 149 N.H. 47, 49 (2003).

Affirmed in part; vacated in part;
and remanded.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox,
Clerk**